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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

KELLY TOYS HOLDINGS, LLC;
JAZWARES, LLC; KELLY
AMUSEMENT HOLDINGS, LLC;
and JAZPLUS, LLC,

Plaintiffs,

vs.

BUILD-A-BEAR WORKSHOP,
INC.,

Defendant.

Case No. 2:24-cv-01169-JLS-MAR

**DECLARATION OF MICHAEL J.
HICKEY IN SUPPORT OF BUILD-A-
BEAR WORKSHOP, INC.'S MOTION
TO DISMISS PLAINTIFFS'
AMENDED COMPLAINT UNDER
FRCP 12(b)(6)**

Date: June 28, 2024

Time: 10:30 a.m.

Place: Honorable Josephine L. Staton
Courtroom 8A

1 I, Michael J. Hickey, declare as follows:

2 1. My name is Michael J. Hickey. I am over twenty-one years of age. I am
3 a partner with the law firm of Lewis Rice LLC and counsel of record for Defendant
4 Build-A-Bear Workshop, Inc. ("Build-A-Bear") in the above-captioned matter.
5 I have personal knowledge of the facts set forth below, and, if called upon as a
6 witness, I could and would testify to such facts under oath.

7 2. I make this declaration in support of Defendant Build-A-Bear's Motion
8 to Dismiss Plaintiffs' Amended Complaint under Federal Rule of Civil
9 Procedure 12(b)(6) in the above-captioned matter.

10 3. On February 27, 2024, counsel for Plaintiffs and counsel for Build-A-
11 Bear conducted a conference pursuant to Local Rule 7-3 and discussed Build-A-
12 Bear's position that the Complaint fail to adequately plead protectable trade dress in
13 the Squishmallows product line and failed to adequately plead copyright
14 infringement.

15 4. On February 28, 2024, counsel for Plaintiffs sent a follow-up
16 communication to counsel for Build-A-Bear via electronic mail.

17 5. During the February 27, 2024 conference and February 28, 2024 e-mail,
18 counsel for Plaintiffs conceded Plaintiffs do not have federally registered trade dress
19 rights or a pending trade dress application for the Squishmallows product line.

20 6. Counsel for Build-A-Bear subsequently communicated with counsel for
21 Plaintiffs via electronic mail on April 2, 2024, prior to filing the instant Motion to
22 Dismiss Plaintiffs' Amended Complaint (ECF No. 25), again raising the grounds that
23 Plaintiffs still failed to adequately plead protectable trade dress in the Squishmallows
24 product line and failed to adequately plead copyright infringement. In subsequent e-
25 mail correspondence, Plaintiffs confirmed their intent to oppose Build-A-Bear's
26 current Motion to Dismiss and declined to participate in another telephonic
27 conference of counsel regarding the same.

7. Attached to Build-A-Bear's Request for Judicial Notice, as Exhibit I, are true and correct copies of the following pleadings from *Kellytoy USA, Inc., et al. v. Dan-Dee Int'l, Ltd., et al.*, Case No. 2:18-cv-05399 (C.D. Cal.):

- a. ECF No. 16, Plaintiffs' First Amended Complaint (pp. 2 – 24);
- b. ECF No. 39, (In Chambers) Order re Defendants' Motion to Dismiss (pp. 25 – 34);
- c. ECF No. 46, Plaintiffs' Second Amended Complaint (pp. 35 – 58);
- d. ECF No. 57, Defendants Dan-Dee International, Ltd.'s and Rite Aid Corporation's Notice of Motion and Motion to Dismiss Second Amended Complaint; Memorandum of Points and Authorities (pp. 59 – 81); and
- e. ECF No. 71, (In Chambers) Order Dismissing Case Without Prejudice (p. 82).

8. Attached to Build-A-Bear's Request for Judicial Notice, as Exhibit J, are true and correct copies of the following pleadings from *Kellytoy Worldwide, Inc., et al. v. Ty, Inc., et al.*, Case No. 1:20-cv-00748 (N.D. Ill.):

- a. ECF No. 21, Plaintiff Kelly Toy Worldwide, Inc.'s Memorandum of Law in Support of its Motion for Preliminary Injunction (pp. 2 – 33);
- b. ECF No. 24, Declaration of Jeanne Yoon in Support of Plaintiffs' [sic] Motion for Preliminary Injunction (pp. 34 – 53);
- c. ECF No. 66, Ty's Motion to Dismiss Counts 3-6 of the Complaint and Memorandum in Support Thereof (pp. 54 – 82);
- d. ECF No. 69, Plaintiffs' First Amended Complaint (pp. 83 – 125); and
- e. ECF No. 105, Plaintiffs' Second Amended Complaint (pp. 126 – 169).

9. Attached to Build-A-Bear's Request for Judicial Notice, as Exhibit K, are true and correct copies of the following pleadings from *Kellytoy Worldwide, Inc., et al. v. Zuru, LLC*, Case No. 2:23-cv-09255 (C.D. Cal.):

- a. ECF No. 1, Plaintiffs' Complaint (pp. 2 – 51);

- b. ECF No. 23, Zuru, LLC's Notice of Motion and Motion to Dismiss (pp. 52 – 83);
- c. ECF No. 26, Plaintiffs' Opposition to Zuru, [sic] LLC's Motion to Dismiss (pp. 84 – 111);
- d. ECF No. 26-2, Plaintiffs' Exhibit A in Support of their Opposition to Zuru, LLC's Motion to Dismiss (pp. 112 – 136);
- e. ECF No. 32, (In Chambers) Order on Motion to Dismiss (pp. 137 – 143);
- f. ECF No. 34, Plaintiffs' Amended Complaint (pp. 144 – 202); and
- g. ECF No. 35, Zuru, LLC's Notice of Motion and Motion to Dismiss (pp. 203 – 232).

10. Attached to Build-A-Bear's Request for Judicial Notice, as Exhibit L, are true and correct copies of the following pleadings from *Kelly Toys Holdings, LLC., et al. v. Build-A-Bear Workshop, Inc.*, Case No. CACE-24-001221 (Florida 17th Cir. Ct.):

- a. Plaintiffs' Verified *Ex Parte* Emergency Motion for Temporary Injunction (pp. 2 – 36);
- b. Plaintiffs' Verified Complaint (pp. 37 – 79); and
- c. Defendant Build-A-Bear Workshop, Inc.'s Motion to Dismiss (pp. 80 – 97).

11. Attached to Build-A-Bear's Request for Judicial Notice, as Exhibit M, are true and correct copies of the following pleadings from *Kellytoy Worldwide, Inc. v. Hugfun International, Inc.*, Case No. CV-19-07652-MWF (C.D. Cal.):

- a. ECF No. 19, Plaintiff Kellytoy Worldwide, Inc.'s Opposition to Motion to Dismiss (pp. 2 – 26);
- b. ECF No. 26, Order Granting Defendant Hugfun International, Inc.'s Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) (pp. 27 – 36); and
- c. ECF No. 27, Plaintiff's First Amended Complaint (pp. 37 – 59).

